

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL DEPOSIT INSURANCE
CORPORATION AS RECEIVER FOR
WASHINGTON FIRST
INTERNATIONAL BANK.

Plaintiff,

BANCINSURE, INC.,

Defendant.

CASE NO. C13-1797 MJP

ORDER ON BANCINSURE'S
MOTION TO DISMISS OR
PERMANENTLY ENJOIN
CLAIMS AGAINST DEFENDANT
BANCINSURE

THIS MATTER comes before the Court on Defendant BancInsure's Motion to Dismiss

or Permanently Enjoin Claims Against Defendant BancInsure (Dkt. No. 29) and Intervenor.

Defendant Washington Insurance Guaranty Association's (WIGA's) Joinder in BancInsure's

Motion (Dkt. No. 34). Having reviewed the Motions, the Responses (Dkt. Nos. 36, 45), and the

Replies (Dkt. Nos. 46, 52), and all related papers, and having heard oral argument on the motion,

on July 23, 2015, the Court hereby DENIES the Motion to dismiss or enjoin but STAYS the case.

and CONSIDERS WIGA's contingent Motion meet

ORDER ON BANCINSURE'S MOTION TO
DISMISS OR PERMANENTLY ENJOIN
CLAIMS AGAINST DEFENDANT
BANCINSURE, 1

Background

2 The FDIC, in its capacity as Receiver for the insolvent Washington First International
3 Bank, filed its complaint for declaratory judgment and breach of contract against the then-solvent
4 Defendant BancInsure on October 4, 2013. (Dkt. No. 1.) The case proceeded normally until July
5 31, 2014, when BancInsure was ordered to show cause by an Oklahoma court why it should not
6 be placed into receivership. (See Dkt. No. 16.)

7 On August 21, 2014, the Oklahoma court placed BancInsure (now known as Red Rock
8 Insurance Company) into receivership, appointed the insurance commissioner of Oklahoma as
9 Receiver, and issued an order “enjoin[ing] and prohibit[ing] [all persons and entities] from
10 prosecuting any pending litigation involving Red Rock (whether as a plaintiff or defendant) or
11 against its insureds; obtaining any preferences, judgments, attachments, or other liens against
12 Red Rock or its insureds; or making any levy against Red Rock or against its assets or any part
13 thereof.” (Dkt. No. 19 at 10.) On BancInsure’s motion, this Court then granted a temporary stay
14 for 120 days. (Dkt. No. 20.) WIGA sought to intervene and extend the stay. (Dkt. No. 21.) This
15 Court granted the motion to intervene and extended the stay until February 17, 2015. (Dkt. No.
16 27.)

17 Meanwhile, on February 13, 2015, BancInsure obtained from the Oklahoma court a
18 modification of the injunction so that two conflicting cases against it (including one brought by
19 the FDIC) that had already proceeded to summary judgment could be appealed to the Ninth
20 Circuit. (See Dkt. No. 30, Ex. C at 23–24.) The order reiterated that in all other respects “[t]he
21 Liquidation Order, including but not limited to its injunction and prohibition of all persons and
22 entities (including secured creditors, unsecured creditors, claimants and/or litigants) from

1 prosecuting any pending action or litigation involving Red Rock (whether as a plaintiff or
2 defendant) remains in full force and effect.” (Id. at 24.)

3 BancInsure now asks this Court to enforce the Oklahoma court’s injunction by either
4 dismissing the claims against it or entering its own permanent injunction. (See Dkt. No. 29.)
5 WIGA asks the Court to allow it to “withdraw” as intervenor in the event the Court dismisses the
6 claims against BancInsure. (See Dkt. No. 34.)

7 **Discussion**

8 As the Ninth Circuit has observed, “[f]ederal courts routinely confront the conflict
9 between their exercise of federal jurisdiction and state laws establishing exclusive claims
10 processing for insurance insolvency.” Hawthorne Savings F.S.B. v. Reliance Ins. Co. of Illinois,
11 421 F.3d 835, as amended by 433 F.3d 1089 (9th Cir. 2005) (quotation marks and citation
12 omitted). Here, BancInsure is asking a federal district court exercising a form of “arising under”
13 jurisdiction (but applying state substantive law) to defer to a state insolvency proceeding.

14 I. The Uniform Insurers Liquidation Act

15 BancInsure argues that Washington courts enforce injunctions ordered pursuant to out-of-
16 state insurer liquidation proceedings and urges this Court to follow their lead.

17 A. Claims with Respect to BancInsure

18 As BancInsure notes, both Washington and Oklahoma have adopted the Uniform Insurers
19 Liquidation Act (“UILA”). See RCW 48.99.010 et seq.; 36 Okla. Stat. § 1921 et seq. The
20 Washington Supreme Court has held that where another state has adopted the UILA, “the courts
21 of Washington should recognize the right of the [out-of-state] liquidator to seek a stay of all
22 proceedings against the defunct insurer.” Am. Star Ins. Co. v. Grice, 123 Wn.2d 131, 134 (1994).
23 (There is no reason to think the Washington Supreme Court would draw a distinction between in
24 rem proceedings and other actions or proceedings, as the Ninth Circuit has suggested the UILA

1 statutory language might be understood; Grice was itself a declaratory judgment coverage action
 2 like this one. Cf. Hawthorne Savings, 421 F.3d at 852–56.)

3 The Ninth Circuit has instructed that at least in diversity cases where the federal court is
 4 applying state substantive law, the outcome of a request to defer to out-of-state insolvency
 5 proceedings should be the same in federal court as it would have been in state court. Hawthorne
 6 Savings, 421 F.3d at 841. This suit is “deemed” to arise under federal law, but solely because the
 7 FDIC is a party. See 28 U.S.C. § 1331; 12 U.S.C. § 1819(b)(2)(A). No one has argued that state
 8 substantive law does not otherwise apply (though the FDIC seems to suggest UILA deference is
 9 not substantive). See also O’Melveny & Myers v. FDIC, 512 U.S. 79, 86 (1994).

10 Because Washington courts would either dismiss or stay the case against BancInsure
 11 pursuant to the UILA, this Court agrees it should do the same. See Grice, 123 Wn.2d at 134;
 12 Olivine Corp. v. United Capitol Ins. Co., 122 Wn.App. 374 (1994).

13 The FDIC objects that federal statutes specific to cases where the FDIC is a party are
 14 applicable here, and 12 U.S.C. 1821(j) provides that “no court may take any action, except at the
 15 request of the Board of Directors by regulation or order, to restrain or affect the exercise of
 16 powers or functions of the Corporation as a conservator or a receiver.” This anti-injunction
 17 provision prevents courts from granting equitable relief against the FDIC. See Sharpe v. FDIC,
 18 126 F.3d 1147, 1154 (9th Cir. 1997). Thus, the Oklahoma court’s purported injunction was not
 19 immediately effective against the FDIC acting in its capacity as receiver. However, the anti-
 20 injunction provision cannot prevent this Court from dismissing or staying the case against
 21 BancInsure based on the deference accorded by the forum state to another state’s insolvency
 22 proceeding.

1 B. Claims Against WIGA Standing in BancInsure's Shoes

2 Although Washington law is clear with respect to claims against BancInsure directly, the
 3 status of the intervenor WIGA, which stands in BancInsure's shoes to the extent of its statutory
 4 liability, is more ambiguous. (See also WIGA Mot. Intervene, Dkt. No. 21 at 2–3.) WIGA argues
 5 it should be allowed to “withdraw” as intervenor if BancInsure is dismissed. (Dkt. No. 34.)
 6 The Court notes that intervenors under Fed.R.Civ.P. 24(a)(2), the provision through which
 7 WIGA sought intervention (see Dkt. No. 21 at 3–4), “enter the suit with the status of original
 8 parties and are fully bound by all future court orders.” United States v. State of Oregon, 657 F.2d
 9 1009, 1014 (9th Cir. 1981) (citations omitted). “By successfully intervening, a party makes
 10 himself vulnerable to complete adjudication by the federal court of the issues in litigation
 11 between the interven[o]r and the adverse party.” Id. (quotation marks and citation omitted). As a
 12 successful intervenor-defendant, therefore, WIGA must be treated as an original defendant, and
 13 cannot simply “withdraw” but must request that the claims relating to its interests be dismissed.

14 The Oklahoma order enjoining litigation against BancInsure did not specifically address
 15 litigation involving state guaranty organizations such as WIGA, and the FDIC points out that
 16 Oklahoma statutory provisions adjacent to the Oklahoma UILA appears to condone continued
 17 litigation against guaranty associations outside the state insolvency proceeding. See 36 Okla.
 18 Stat. § 1902(D) & (E). Furthermore, in the Washington case which established the effect of
 19 injunctions in reciprocal states, WIGA and another party agreed that the status of the insolvent
 20 insurer “should not prevent an action against WIGA.” See Grice, 123 Wn.2d at 137–38.

21 WIGA also urges the court to allow its withdrawal (i.e., dismiss it from the lawsuit)
 22 because of the risk of inconsistent results. (Dkt. No. 34 at 4.) It would appear that allowing the
 23 FDIC to proceed against WIGA here to the extent of its liability carries the risk of inconsistent

1 results because the Oklahoma court would decide coverage issues between the FDIC and
 2 BancInsure while the FDIC's claims against WIGA depend in part on whether there exist
 3 "covered claims" under BancInsure policy. See RCW 48.32.060(1)(b). Even so, Oklahoma law
 4 appears to require the insolvency court to defer to this Court's determinations about WIGA's
 5 liability, if any. 36 Okla. Stat. § 1902(E) ("The determination of any dispute with respect to the
 6 statutory obligations of any guaranty association by a court or administrative agency or body
 7 with jurisdiction in the state of domicile of the guaranty association shall be binding and
 8 conclusive as to the parties in a delinquency proceeding initiated in the district court, including,
 9 without limitation, the policyholders of the insurer.").

10 There is no clear law compelling WIGA's dismissal from the case. However, WIGA in
 11 its Reply requests in the alternative a stay of proceedings rather than dismissal. (Dkt. No. 52 at
 12 8.) These options are considered below.

13 II. Jurisdiction, Abstention, and Stay of Proceedings

14 The state-law result compelled by Grice with respect to BancInsure does not indicate that
 15 state courts have any direct power to enjoin federal *in-personam* proceedings; they do not. See
 16 Hawthorne Savings, 421 F.3d at 850–51 (citing, *inter alia*, Donovan v. City of Dallas, 377 U.S.
 17 408, 412–13 (1964)).

18 Nor does the result suggest that the source of federal jurisdiction in this case is reverse
 19 preempted by the McCarran-Ferguson Act. In a similar case under diversity jurisdiction, the
 20 Ninth Circuit held that the McCarran-Ferguson Act does not work in conjunction with the UILA
 21 to reverse preempt 28 U.S.C. § 1332, the source of federal jurisdiction in that case. Hawthorne
 22 Savings, 421 F.3d at 842–43. The case for reverse preemption is even weaker in the arising-
 23 under context; the Court agrees with the FDIC that the Court is not deprived of jurisdiction here.

1 The abstention doctrines raised by BancInsure and WIGA are also unavailing. Abstention
 2 from the exercise of federal jurisdiction is “an extraordinary and narrow exception to the duty of
 3 a District Court to adjudicate a controversy properly before it.” Colorado River Water
 4 Conservation Dist. v. United States, 424 US. 800, 813 (1976) (quoting County of Allegheny v.
 5 Frank Mashuda Co., 360 U.S. 185, 188 (1959)).

6 Generally, as the FDIC points out, the abstention doctrine used when federal courts
 7 encounter state insolvency “injunctions” is Burford abstention. However, the Ninth Circuit has
 8 distinguished Burford from cases such as this one, “where the application of one state’s
 9 substantive law [is] argued to interfere with another state’s regulatory policy” rather than the first
 10 state’s own regulatory policy. Hawthorne Savings, 421 F.3d at 845. Dismissal of this case would
 11 result in an Oklahoma court deciding issues of Washington coverage law, so there is no reason to
 12 expect special competence beyond that supplied by a federal court that regularly applies
 13 Washington law in diversity cases. The principles animating Burford abstention are not relevant
 14 here. Furthermore, the Supreme Court has held that Burford abstention leading to dismissal (as
 15 BancInsure requests) rather than a stay is not available in actions at law, and here the FDIC is
 16 seeking damages for breach of contract as well as a declaratory judgment. (Dkt. No. 1 at 15.) See
 17 Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 731 (1996).

18 WIGA also urges the Court to abstain based on Colorado River abstention (and Wilton-
 19 Brillhart for the declaratory judgment claims). (Dkt. No. 34 at 3–4.) The Court is not persuaded
 20 that any of the Colorado River factors weigh strongly in favor of abstention and agrees with the
 21 FDIC that “exceptional circumstances” are not present here. Furthermore, the Colorado River
 22 doctrine does not apply in the absence of parallel state court proceedings. Kirkbride v. Cont’l
 23 Cas. Co., 933 F.2d 729, 734 (9th Cir.1991). Ninth Circuit cases have held that state receivership

1 proceedings are not parallel to substantive disputes against the insolvent entity for the purpose of
 2 Colorado River abstention. Tucker v. First Maryland Sav. & Loan, Inc., 942 F.2d 1401, 1408
 3 (9th Cir. 1991).

4 Even absent grounds for abstention, however, a federal district court has broad discretion
 5 in deciding whether to issue a stay under Landis v. North American Co., 299 U.S. 248, 254
 6 (1936). See Lockyer v. Mirant Corp., 398 F.3d 1098, 1110 (9th Cir. 2005). “A trial court may,
 7 with propriety, find it is efficient for its own docket and the fairest course for the parties to enter
 8 a stay of an action before it, pending resolution of independent proceedings which bear upon the
 9 case.” Leyva v. Certified Grocers of Cal., Ltd., 593 F.2d 857, 863 (9th Cir. 1979). “Where it is
 10 proposed that a pending proceeding be stayed, the competing interests which will be affected by
 11 the granting or refusal to grant a stay must be weighed.” CMAX, Inc. v. Hall, 300 F.2d 265, 268
 12 (9th Cir. 1962). Those competing interests are “the possible damage which may result from the
 13 granting of a stay, the hardship or inequity which a party may suffer in being required to go
 14 forward, and the orderly course of justice.” Lockyer, 398 F.3d at 1110 (internal citations
 15 omitted). The orderly course of justice is “measured in terms of simplifying or complicating of
 16 issues, proof, and questions of law which could be expected to result from a stay.” Id.
 17 Here, a stay affords the BancInsure Receiver an opportunity to request (as it did in two other
 18 actions) that the Oklahoma court lift the injunction with respect to these coverage issues, whether
 19 defended by WIGA or BancInsure, so that it is clear in which forum the issues will be resolved.
 20 Alternatively, the stay could allow the Oklahoma court to resolve the issues against BancInsure,
 21 at which point this Court could proceed to analyze the extent to which WIGA remains liable.

22 A stay of the action against both BancInsure and WIGA appears to conform to the
 23 Washington Supreme Court’s holding in Grice requiring either dismissal or stay in response to

1 insolvency injunctions in reciprocal states. It also mirrors recent district court decisions in the 9th
2 Circuit with respect to this same insolvency proceeding. See, e.g., Idaho Trust Bank v.
3 BancInsure, Inc., No. 1:12-cv-00032-REB, 2014 WL 4064063, *6 (D. Idaho Aug. 15, 2014).
4 And it allows this Court to retain jurisdiction over WIGA, a creature of Washington law
5 conceived to protect Washington policyholders, which may not be subject to the jurisdiction of
6 the Oklahoma court. See 36 Okla. Stat. § 1902(D).

7 **Conclusion**

8 The Court DENIES BancInsure's Motion to dismiss or enjoin but STAYS the case. The
9 Parties are further ORDERED to provide a Joint Status Report six (6) months from this Order
10 and every six months thereafter. The Court CONSIDERS WIGA's Motion moot because it was
11 premised on a contingent event, dismissal, which did not occur.

12
13
14 The clerk is ordered to provide copies of this order to all counsel.

15 Dated this 24th day of July, 2015.

16
17
18
19 
20 Marsha J. Pechman
21 Chief United States District Judge
22
23
24